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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 957

[redacted] HALE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. .....

MAC T. HALL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mac T. Hall prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit affirming his conviction for unlawfully, knowingly and willfully aiding, abetting and inducing James Cook Evans, an officer of the First National Bank of Dallas, a member of the Federal Reserve System, to make false entries and misapply the funds of said bank in violation of Section 656 and Section 1005, Title 18 U.S. Code.

OPINION BELOW

The District Court for the Northern District of Texas did not render an opinion. The opinion of the Court of Appeals has not been reported, but is reproduced as Appendix "A" to this petition. (R. 134).

JURISDICTION

The opinion (Appendix "A") and judgment (Appendix "B") (R. 145) of the Court of Appeals are dated December 23, 1960 and a petition for rehearing timely filed was denied on January 31, 1961, without a written opinion, (Appendix "C"). (R. 159). On February 22, 1961 a Per Curiam Opinion of the Court of Appeals was entered recalling the Mandate in order that petitioner might file an Application for Writ of Certiorari to the Supreme Court. (R. 160). By order dated March 2, 1961 Mr. Justice Black enlarged the time for filing this petition to and including April 1, 1961. The jurisdiction of this court is invoked under *28 U.S.C. 1254-1.*

QUESTIONS PRESENTED

1. Can Hall be convicted for unlawfully, knowingly and willfully aiding, abetting and inducing Evans, an officer of the bank, to make false entries and misapply the funds of the bank where no evidence was introduced in the case to prove that Evans had entered a plea of guilty or even that he had been convicted of willfully making any false entries or had misapplied the funds of the bank?

2. Has the defendant enjoyed due process of the law when the trial judge and the Court of Appeals both held and expressed doubt as to his guilt?

3. Will due process permit the Court of Appeals to apply one rule to Hall, and a direct opposite rule to James P. Edwards, Jr., another defendant in the same case?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person * * * be deprived of life, liberty, or property, without due process of law; * * *"

STATUTES INVOLVED

Section 656, Title 18 of the United States Code provides:

> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, *embezzles, abstracts, purloins, or willfully misapplies* any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities entrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; etc."
>
> "As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company, which has become a member of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the de-

posits of which are insured by the Federal Deposit Insurance Corporation. June 25, 1948, c. 645, 62 Stat. 729." (Italics ours.)

Section 1005 (False Entry), *Title 18 of the United States Code* provides:

"Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

"Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond or other obligation; or mortgage, judgment or decree; or

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 2, Title 18 of the United States Code provides:

"PRINCIPALS

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands,

induces, or procures its commission is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States is also a principal and punishable as such."

FEDERAL RULES INVOLVED

Rule 52(b) of Federal Rules of Criminal Procedure provides:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF THE CASE

Mac T. Hall, Petitioner, was indicted (R. 3) and convicted (R. 105) in the District Court of the United States for the Northern District of Texas, charged with unlawfully, knowingly and willfully aiding, abetting and inducing James Cook Evans, an officer of the First National Bank of Dallas, a member of the Federal Reserve System, to make false entries and misapply the funds of said Bank. The case was tried before the Court without a jury. At the conclusion of the evidence the following took place:

"THE COURT:

"I will say to counsel that there seems to me what ordinarily term an absence of willful and malicious intent to commit fraud, and yet that is not always required to constitute fraud. We have constructive frauds.

"I am going to take this under advisement and if you gentlemen care to you might write me a

three page letter which would show what you consider the fraud in this case. The fraud is not a willful, malicious fraud; it is a friendship and an interest and an interchange of interest, apparently, between an officer of the bank and the defendant that is not countenanced by good banking; it might constitute the evil intent that the law requires.

"Whether it does or not I believe I will ask you to look up the law on it and write me a three page letter and I will decide it in time to put this case into the group disposing of all of these bank cases." (Record Page 104).

The Court of Appeals in discussing the observations of the trial court quoted above, on Page 9 of its opinion stated:

"At the conclusion of the evidence, the trial judge was in considerable doubt as to whether the necessary criminal intent had been proved, and called for letter briefs from the parties, stating: * * *" (See quotation above)

The Court of Appeals further stated:

"Thereafter, the trial judge resolved his doubt as to criminal intent in favor of the Government, but nonetheless stated in imposing sentence on Hall that: 'I will say this, however, I will impose a sentence of two years, but if you should correct the matter by returning to Mr. Evans' bank the money and make restitution for the money you misapplied I would consider probation. I don't make that promise, but I will consider it.' "

When counsel for Petitioner appeared before the Court of Appeals for oral argument the presiding judge announced from the bench that the members of the Court had studied the record and brief of Appellant and were firmly convinced that the evidence was insufficient to support a verdict of guilty, and that oral argument was unnecessary. Accordingly counsel did forego oral argument. However, the Court did invite oral argument in the Edwards case. Upon Motion (R. 129) of the United States Attorney the Hall case, petitioner herein, and the Edwards case were consolidated by the Court (R. 130) for oral argument before the Court of Appeals.

In this state of the record, it was the duty of the trial court to find a verdict of not guilty as a matter of law, and failing there, it was the duty of the Court of Appeals to reverse and remand this cause in accordance with the Fifth Circuit's own opinion in *Cuthbert v. United States* 278 Fed. 2d 220 which reads in part:

> "We think that in thus struggling with his doubts and fears and thus rationalizing them away, without distinguishing between his role as Judge of the law and his role as trier of the facts, the district judge failed to keep in mind that, in a circumstantial case like this, in order for the evidence to make out a case for his determination as trier of the facts, it was not sufficient for him to conclude merely that the circumstances relied on were consistent with a reasonable finding of guilt. He must also conclude that they were not, as matter of law, inconsistent with such a finding. We think, too, that, as the result of this fail-

ure and of his expressed feeling that he did not want to be imposed upon, he temporarily lost sight of his difficult but inescapable double obligation as judge of both the law and the facts where the defendants' liberties were concerned, and thus permitted himself as a finder of facts to accept possibilities as probabilities and to decide as an issue of fact what he should have first decided as an issue of law, whether there was sufficient evidence to support a fact finding. In short, in struggling as a trier of the facts, with the dilemma presented by the clash of his doubts and fears, he lost sight of his primary position as a judge of the law which required him to first decide whether the circumstances relied on were in law of sufficient probative force to support a fact finding of guilt. In so struggling, he sought escape from the confusion caused by this unresolved conflict in a strongly worded affirmation that he was free from doubt, an affirmation by which certitude was made to seem certainty, an impermissible course, we think, in the trial of a criminal case and the resolution of doubts raised therein. In our opinion, instead of trying the case as a trier of facts, and, as such rationalizing himself into discarding the doubts he felt as a judge of the law, and finding defendants guilty as a matter of fact, he should as matter of law have taken counsel of his doubts and acquitted them."

As above stated, the Petitioner was convicted for having aided and abetted one James Cook Evans, Assistant Vice-President of said First National Bank of Dallas, but there is not one line of testimony in the Record (Pages 35-82) that James Cook Evans was guilty of committing the offense alleged, and there-

fore to convict Petitioner for aiding and abetting Evans in the commission of an offense, where there is no evidence in the record that Evans did commit it, is in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

> "The law requires a guilty principal before the aider and abettor can be punished." *Karrell v. US* 9 Cir. 1950, 181 F. 2d 981, 985.

Edwards and Hall were indicted for the same offense, except in different counts of the indictment and there is no evidence in the record whatever that Evans, the principal, was guilty of the violation of said Statute. (R. 35-82). Evans never did admit a criminal intent. (See quotation in Opinion in Edwards case below). Petitioner took the stand and denied criminal intent. The Court of Appeals in its Opinion in the Edwards case said:

> "As the court recognized, under this indictment charging Edwards with aiding and abetting Evans to commit the offenses, it was necessary to establish the guilt of Evans as well as that of the defendant Edwards.
>
> 'The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime.' US v. Howitt D.C. S.D. Fla. 1944, 55 F. Supp. 372, 374 aff'd 5 Cir., 1945, 150 F. 2d 82, aff'd; 1946, 328 U.S. 189.'
>
> * * *
>
> No evidence was introduced in this case to prove that Evans had entered a plea of guilty, or even that he had been convicted. Further, the district

> court was in error when it stated to the jury that 'Evans a vice president of the bank has taken the stand and admitted his guilt.' While Evans freely admitted that he had brought about the large shortage he never did admit his criminal intent."

The Court of Appeals reversed and remanded Edwards' conviction because the Court held that there was no evidence of Evans' guilt.

The Edwards' Opinion has not been reported, but is attached hereto in the form of Appendix "D",

How can the Court of Appeals apply one rule to the defendant Edwards and reverse his case on the ground that there was no evidence of guilt on the part of the banker Evans and then apply a contrary rule to affirm the case of petitioner?

As stated by the trial court there was an absence of willful and malicious intent to commit fraud on the part of Petitioner. Petitioner testified in his own behalf and denied guilt of any such intent. Such is the state of the record. The trial court was in doubt. The Court of Appeals was in doubt. See Page 9 Opinion of the Court, Appendix A. See also Note on end of Opinion concerning the rule relating to probation. Yet both applied a new rule contrary to an unbroken line of decisions in this court (*United States v. Britton*, 1883, 108 U.S. 199, 206, 2 S.Ct. 531, 27 L.Ed. 698). As said in the earlier *Britton appeal*, 1882, 107 U.S. 655, 668, 2 S.Ct. 512, 523, 27 L.Ed. 520:

> "* * * 'it must be a willful misapplication for the use or benefit of the party charged, or of some

person or company other than the association, with intent to injure and defraud the association or some other body corporate, or some natural person.'"

REASONS FOR GRANTING THE WRIT

1. In affirming the petitioner's case the Court of Appeals for the Fifth Circuit rendered an opinion on an important matter different from the same question handled by other Courts of Appeals and in violation of the opinion of this court in *United States v. Britton*, supra, and in *Holland v. U.S.*, 348 U.S. 121, 99 L. Ed. 150.

2. The trial court was in doubt. The Court of Appeals was in doubt. Yet both applied a new rule contrary to an unbroken line of decisions of this court since the Britton case.

3. The conflicting decisions of the United States Court of Appeals for the Fifth Circuit in the Edwards case and the Hall case calls for supervision and clarification by this Honorable Court.

4. The *Statute (18 U.S.C. 2314)* fashions a crime out of certain acts committed with "unlawful and fradulent intent." The trial court found an absence of unlawful and fraudulent intent on the part of petitioner. How can a conviction stand in direct violation of the mandatory provisions of the Statute?

In deciding the *Cuthbert* case supra the court relied upon and cited the case of *Vick v. United States*, 216 F. 2d 228, as follows:

"'In circumstantial evidence cases, this Court

> has said repeatedly that to sustain conviction the inferences reasonably to be drawn from the evidence must not only be consistent with guilt of the accused but inconsistent with every reasonable hypothesis of his innocense. Kassin v. United States, 5 Cir., 87 F. 2d 183, 184; Rent v. United States, 5 Cir., 209 F. 2d 893, 899; McTyre v. United States, 5 Cir., 213 F. 2d 65, 67."

In *Rodriquez v. United States*, 232 F. 2d 819, 820, at page 821 in a case tried by the court without a jury, the Fifth Circuit reversed the conviction of the defendant stating:

> "The authorities are clear that circumstantial evidence may, of course, *** convict. Nevertheless, because of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, and particularly not sufficiently exclusive of every innocent hypothesis, the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to the acceptable standards."

See also *Holland v. United States*, 348 U.S. 121, 99 L. Ed. 150, and *McFarland v. United States*, 273 F. 2d 417, 419.

5. A defendant has, of course, a "fundamental right" to "be convicted of crime only on proof of all elements of the crime charged against him." *Christoffel v. United States*, 338 U.S. 84, 90.

CONCLUSION

For the reasons stated, a writ of certiorari should issue and the conviction should be reversed.

Respectfully submitted:

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CERTIFICATE

I certify that copies of the above and foregoing petition were dispatched to the Solicitor General, Department of Justice, Washington 25, D.C., and to Mr. W. B. West III, United States Attorney, United States Court House, Fort Worth, Texas, postage prepaid, this 20th day of March, 1961.

Cecil A. Morgan, Esquire

APPENDIX "A"

IN THE
United States Court of Appeals
For the Fifth Circuit

No. 18282

MAC T. HALL, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of Texas.

(December 23, 1960.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: Tried to the court without a jury,[1] Hall was found guilty on Counts 1, 10, 11 and 12 of the indictment and was sentenced to imprisonment for two years. His appeal presents the single question of the sufficiency of the evidence to sustain the judgment of conviction.

The Government calls attention that no motion for judgment of acquittal was made in accordance with Rule 29 (a), Federal Rules of Criminal Procedure, and insists that the applicable test for review is that "the error must be such as would result in manifest miscarriage of justice or affect seriously the fairness of judicial proceedings."[2] In a case tried to a jury, the writer, as the organ of this Court, has stated that in

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1 See Rule 23(a), Federal Rules of Criminal Procedure.

2 Quoted from United States v. Safur, 7 Cir., 1958, 251 F. 2d 30, in turn quoting United States v. Vasen, 7 Cir., 1955, 222 F. 2d 3.

the absence of such a motion "the evidence will be reviewed by this Court only to prevent a manifest miscarriage of justice."[3] The rule was, however, otherwise, and perhaps better, stated for this Court by Judge Foster in *Collins v. United States*, 5 Cir. 1933, 65 F. 2d 545, 546, as follows:

> "It is well settled that, where there is no substantial evidence to support a conviction in a criminal case, it is the duty of the trial court to direct a verdict of acquittal, regardless of whether a motion to that effect is made. If from the record or facts of which the court may take notice it appears that the conviction cannot be sustained, plain error appears on the record, and the judgment will be reversed. Clyatt v. U.S., 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726; Gambino v. U.S., 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381."

Further, Rule 29 (a) is now so worded as to require the court "of its own motion" to order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction.[4]

In any event, there can be little or no need for a formal motion for a judgment of acquittal in a criminal case tried to a court without a jury upon the defendant's plea of not guilty. The plea of not guilty asks the court for a judgment of acquittal, and a mo-

[3] Demos v. United States, 5 Cir., 1953, 205 F. 2d 396, 399, citing Thomas v. United States, 189 F. 2d 430.

[4] "The court on motion of a defendant *or of its own motion* shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses . . . ." (Emphasis supplied.) Rule 29 (a), Federal Rules of Criminal Procedure.

tion to the same end is not necessary. *De Luna v. United States*, 5 Cir., 1955, 228 F. 2d 114, 116. In such a case, therefore, we hold that the sufficiency of the evidence to sustain a conviction should be reviewed the same as if there had been a formal motion for judgment of acquittal.

Count 1 charged that Hall did "unlawfully, knowingly, and willfully aid, abet and induce"[5] one James Cook Evans, an Assistant Vice President, Collection Department, First National Bank of Dallas, Texas, to knowingly, unlawfully, willfully and feloniously make a fase entry in one of the bank's books to the effect that at the close of business on October 9, 1959, the cash items section of said bank held valid cash items totaling $5,606,872.52; whereas, in truth and in fact, said Evans then well knew that said figure was overstated and included worthless and unsecured drafts and checks payable through said bank in the total sum of $243,949.78,[6] and that this total included drafts and checks previously drawn and caused to be drawn by Mac T. Hall in the sum of $4,360.13.[7]

[5] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C.A. §2(a).

[6] The evidence shows without dispute that the actual total of unpaid and unsecured drafts was $290,320.03.

[7] Section 1005, Title 18, U.S.C.A., provides in part:

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Counts 10, 11 and 12 charged that Hall aided, abetted and induced Evans to willfully misapply moneys and credits of the bank to the use and benefit of Hall by causing the bank to pay out of its moneys and credits certain particular drafts signed by Hall.*

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* Section 656 of Title 18, U.S.C.A., provides in pertinent part:
"§656. *Theft, embezzlement, or misapplication by bank officer or employee.*

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The drafts were described as follows:

Count 10:

"Date 5-13-59	Payee Southwestern Investment Company	Amount $155.11	Maker Mac T. Hall	Drawn On Midwest Refining Company, First National Bank, Dallas, Texas."

Count 11:

"Date 6-15-59	Payee Southwestern Investment Company	Amount $155.11	Maker Mac T. Hall	Drawn On Midwest Refining Company, thru First National Bank in Dallas."
"Date 7-11-59	Payee NEW MEXICO TIMBER CORPORATION	Amount $500.00	Maker Mac T. Hall	Drawn On Midwest Refining Company through First National Bank in Dallas."

The only really disputed issue was the criminal intent *vel non* of Hall. It is, of course, settled, as well stated by the Supreme Court in *Nye & Nissen v. United States*, 1949, 336 U.S. 613, 619:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, J., in *United States v. Peoni*, 100 F. 2d 401, 402."

Here, as in most cases, criminal intent *vel non* must be inferred from the facts and circumstances of the case. The test to be applied on review is whether the judge could reasonably find that the evidence excludes every reasonable hypothesis except that of guilt;[10] or, otherwise expressed, whether there was relevant evidence from which the judge could properly find or infer beyond a reasonable doubt that the accused is guilty.[11]

Evans admitted having made false entries in the books of the bank to conceal an over-all shortage of $290,320.03. A part of that shortage was represented by 154 unpaid drafts drawn by Hall in the aggregate amount of $4,360.13. Hall wrote the drafts and put them in circulation but had nothing to do with keeping the records.

Evans had been employed by the bank for thirty-four years and was in charge of the Collection Depart-

[10] See Cuthbert and Busby v. United States, 5 Cir., 1960, 278 F. 2d 220, 224.

[11] Riggs v. United States, 5 Cir., 1960, 280 F. 2d 949, 955.

ment. Evans had written a trust receipt[12] for these drafts, had signed the trust receipt Midwest Refining by Mac T. Hall, and had placed the trust receipt with the regular records of the bank. Prior to the accumulation of these unpaid drafts, Hall had over a period of several years (more than three or four years) drawn drafts in his name on Midwest Refining.[13] Some of those drafts had been paid by the end of the next business day. Just prior to May 6 or 7, 1959, there had been an accumulation of unpaid drafts in the amount of $1,839.43 which were paid, and Hall then had a zero balance in the Collection Department of the bank. Hall also carried a deposit in the bank but the amount of his deposit does not appear from the testimony. The 154 unpaid drafts drawn by Hall against Midwest Refining Company accumulated during the months of May through September 1959, with an unpaid balance at the end of each month as follows: May, $698.02; June, $1,860.64; July, $3,431.59; August, $3,954.85; September, $4,360.13.

Hall and Evans had been close business associates for a number of years. Hall had done Evans a number of business favors. He had given to Evans, without charge, three or four oil and gas leases, thought to be of some value at the time of assignment but which proved to be worthless; he had issued to Evans four certificates of stock in Midwest Refining Company of a total value of $4,000.00, on which Evans had paid

[12] According to the evidence, a trust receipt is "commonly used by people to take items out of the bank for examination."

[13] Midwest Refining Company was a corporation organized by Hall which had plans for the building of an oil and gas refinery at Albuquerque, New Mexico.

$1,300.00,[14] he had made Evans the beneficiary of a policy of life insurance, telling him "that he was having a lot of trouble and that in case anything happened to him and he should have any outstanding drafts this would take care of it."

Hall had talked willingly with the FBI agent who investigated the case, and Hall testified at length in his own behalf. He testified that he held oil leases on some 25,000 acres of land and that in his opinion those leases had value; that the Midwest Refining Company which he headed had real prospects for the building and operation of a refinery; and that he hoped to be able to pay the drafts. On cross-examination, he admitted that he had had large experience in banking and in the borrowing of moneys on promissory notes; that he had borrowed a lot of money and had dealt with many banks. He further admitted that he had never paid any interest on any draft which Evans had handled for him.[15]

[14] Each certificate was of the value of $1,000.00. The first certificate Evans received in August, 1957; the second on June 7, 1958; the third in July, 1958; and the fourth on March 26, 1959.

[15] "Q. Have you ever paid any interest on any draft that Mr. Evans was taking care of for you?

"A. No, sir.

"Q. And he took care of them over an extended period?

"A. Yes.

"Q. As a matter of fact, the evidence is he took care of bank drafts for you on a number of occasions both before the beginning of the period shown on this chart and afterward, that is from 1957. He took care of drafts for you on a number of occasions before that?

"A. Yes.

"Q. For extended periods of time?

"A. Yes.

"Q. In substantial sums?

"A. Yes.

"Q. And never a penny of interest yet?

"A. That is right."

At the conclusion of the evidence, the trial judge was in considerable doubt as to whether the necessary criminal intent had been proved, and called for letter briefs from the parties, stating:

> "I will say to counsel that there seems to me what we ordinarily term an absence of wilful and malicious intent to commit fraud, and yet that is not always required to constitute fraud. We have constructive frauds.
>
> "I am going to take this under advisement and if you gentlemen care to you might write me a three page letter which would show what you consider the fraud in this case. The fraud is not a wilful, malicious fraud, it is a friendship and an interest and an interchange of interest, apparently, between an officer of the bank and the defendant that is not countenanced by good banking; it might constitute the evil intent that the law requires."

Thereafter, the trial judge resolved his doubt as to criminal intent in favor of the Government, but nonetheless stated in imposing sentence on Hall that: "I will say this, however, I will impose a sentence of two years, but if you should correct the matter by returning to Mr. Evans' bank the money, and make restitution for the money you misapplied I would consider probation. I don't make that promise, but I will consider it."

Upon oral argument, the members of this Court were likewise impressed with serious doubt as to whether there was sufficient evidence to prove criminal intent on the part of Hall. At that time, we were assuming the necessity of proof beyond a reasonable

doubt of Hall's intent not ultimately to pay the drafts. If that were essential, then we are still of the opinion that a judgment of acquittal should be entered. However, after a thorough study and consideration of the entire record, we have come to the conclusion that the proof need not go to that extent, and that the evidence was sufficient to support Hall's conviction on Counts 10, 11 and 12.[16]

The willful misapplication referred to in 18 U.S.C.A § 656 must have been, in this case, a willful misapplication for the use or benefit either of Evans or of Hall with intent to injure and defraud the bank.[17] Evans was an experienced banker and Hall was a businessman of wide experience. The district court could rationally believe beyond a reasonable doubt that Hall knew that Evans was misapplying the funds of the bank in making repeated and substantial loans to Hall on unpaid and unsecured drafts and without charging any interest.[18] See *Logsdon v. United States*, 6 Cir., 1958, 253 F. 2d 12, 14, 15. The fact that Hall intended that the principal amount should ultimately be repaid to the bank is no defense. As was well said by Judge Prettyman, speaking for the Fourth Circuit, in *Rakes v. United States*, 4 Cir., 1948, 169 F. 2d 739, 746:

"In the course of his pre-sentence discussion, the

[16] The general two-year sentence would be justified by Hall's conviction on any one count of the indictment, and we need not review the sufficiency of the evidence to support Hall's conviction on Count 1. See Abrams v. United States, 1919, 250 U.S. 616, 619.

[17] See United States v. Meyer, 3 Cir., 1959, 266 F. 2d 747, 754.

[18] Evans testified that he could not recall any specific time, but that he had told Hall in connection with the accumulation of unpaid drafts "that I would probably lose my job if it came out."

trial judge said that he felt that there was no intent on the part of Gardner and appellant 'eventually to take this money away from the bank' that 'they both thought they would get to pay it back'; that the income tax 'broke up' the contemplated loan from the insurance company, and that appellant at all times had sufficient assets to pay what he owed. Appellant construes these remarks as establishing that he had no criminal intent, and thus that the instruction to the jury on intent was erroneous and without foundation. Of course, what the court was saying, as the entire text of its discussion shows, was that appellant had assets to meet his debts, that he and Gardner planned to cover their transactions with the proceeds of the contemplated loan, and that when the negotiations for the loan failed the whole scheme collapsed, but that all this had nothing to do with the intent to misapply the funds of the bank. The slightest thought shows the correctness of the court's position. Many embezzlers fully intend to return the money they take, if a horse wins a race, or the stock market goes up, or if next month's expenses are not so heavy. Moreover, the fact that a man has assets does not negative an intent to steal; a rich man can be guilty of theft; the question is not what he has but what he takes and how he takes it."

We conclude that the trial court could properly infer beyond a reasonable doubt that Hall had the requisite criminal intent.[19] The judgment is

AFFIRMED.

[19] In view of the district court's announced intention to consider probation, we deem it appropriate to call attention that under Rule 35, Federal Rules of Criminal Procedure, the district court has sixty (60) days after receipt of the mandate of affirmance in which to consider whether to reduce the sentence. That is a matter, however, left solely to the discretion of the district court.

APPENDIX "B"

JUDGMENT

Extract from the Minutes of December 23, 1960

No. 18,282

MAC T. HALL,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C"

ORDER DENYING REHEARING

Extract from the Minutes of January 31, 1961

No. 18,282

MAC T. HALL,

versus

UNITED STATES OF AMERICA.

The petition for rehearing in the above styled and numbered cause is hereby, DENIED.

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18291

JAMES P. EDWARDS, JR., *Appellant*

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the Nothern District of Texas

December 23, 1960

Before RIVES, BROWN and WISDOM, Circuit Judges

RIVES, Circuit Judge, Edwards was charged in the same indictment with Mac T. Hall whose conviction is affirmed today.[1] While Hall was tried to the court without a jury, the judgment of conviction of Edwards was based on a jury's verdict. Edwards was found guilty on Counts 1, 7, 8 and 9 of the indictment and was sentenced to imprisonment for five years.

Count 1 has been described in our opinion in the Hall case. Counts 7, 8 and 9 were in all respects similar to Counts 10, 11 and 12 described in the Hall case, except that the drafts described were different and were drawn by Edwards.

Five hundred and fifty-three drafts were introduced in evidence, signed by Edwards and drawn variously

[1] Mac T. Hall v. United States of America No. 18282

against Edwards, First National Bank of Dallas, and Cardinal Oil of Dallas, dated variously from April 20, 1957, through October 3, 1959. The bank had paid all of these drafts without collecting on them and had received no reimbursement. These drafts represented $46,130.06 of an over-all shortage of $290,320.03 on the part of the Vice President of the Bank, James Cook Evans. There was additional evidence strongly tending to prove Edwards' guilt under Counts 7, 8, & 9 of the indictment. As to those three counts, we have no doubt that the district court properly denied Edwards' motion for judgment of acquittal.

Of the various other objections to instructions to the jury, either given or refused, it is necessary to rule on only one. In its oral charge the court instructed the jury as follows:

> "The defendant Edwards is charged with aiding and abetting and inducing the commission of a wrongful act. He cannot be guilty unless there was another man guilty that he was aiding and abetting and while the defendant Evans, a vice-president of the bank, has taken the stand and admitted his guilt and entered a plea of guilty in the case it still does not necessarily follow that the defendant Edwards is guilty of aiding and abetting, because we cannot do a crime of this kind ignorantly. The criminal knowledge must be there and the intent to aid Evans in a wrongful and illegal act must have entered into the conduct of the defendant for him to be guilty . . ."

The court thereafter complied with Rule 30, Federal Rules of Criminal Procedure, and afforded opportunity to make objections to its charge out of the

hearing of the jury. Edwards' counsel then objected to the court's statement that Evans had entered a plea of guilty and the court responded: "That is a matter of common knowledge. It occurred in open court, and has been in all of the papers."

As the court recognized, under this indictment charging Edwards with aiding and abetting Evans to commit the offenses, it was necessary to establish the guilt of Evans as well as that of the defendant Edwards.

> "The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime." US v. Howitt D.C. S.D. Fla. 1944, 55 F.Supp. 372, 374 aff'd 5 Cir., 1945, 150 F. 2d 82, aff'd, 1946, 328 U.S. 189.
>
> "The law requires a guilty principal before the aider and abettor can be punished." Karrell v. US 9 Cir. 1950, 181 F. 2d 981, 985.

No evidence was introduced in this case to prove that Evans had entered a plea of guilty, or even that he had been convicted. Further, the district court was in error when it stated to the jury that "Evans a vice president of the bank has taken the stand and admitted his guilt." While Evans freely admitted that he had brought about the large shortage he never did admit his criminal intent.[2] To the contrary Evans

[2] We have just stated in the Mac T. Hall case:
"The willful misapplication referred to in 18 U.S.C.A. § 656 must have been in this case, a willful misapplication for the use or benefit of either Evans or of Hall with intent to injure and defraud the bank."
See US v. Meyer 3 Cir. 1959, 266 F. 2d 717, 734.
Mac T. Hall v. U.S. No. 18282 m sp.9

testified in response to the court's questioning as follows:

> "THE COURT: Mr. Evans, inasmuch as the Defendant Edwards was not a customer of your bank what was the advantage or reason for making these indirect advances instead of a straight loan?
>
> THE WITNESS: Well, in my capacity I didn't have authority to make loans, and I was hopeful of securing some new business for the bank."

Despite the strong evidence of guilt, we cannot hold that this erroneous charge was harmless.[3] No matter how conclusive the evidence a court may not direct a verdict of guilty.[4] While this charge did not direct the jury to find the defendant guilty, it did take from the jury the question of Evans guilt. Worse, that was done on the basis of an admission which Evans had not made and of a plea of guilty as to which there was no proof. The judgment must therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

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[3] See Rule 52(a) Federal Rules of Criminal Procedure.

[4] Brotherhood of Carpenters v. US 1947, 330 U.S. 395, 408; 23 CJS Crminal Law § 1146.